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No. 91-79

In The

Supreme Court of the United States

October Term, 1991

DEBORAH S. BLUE AND RONALD M. BLUE,

Petitioners,

v.

GENESEE MEMORIAL HOSPITAL, INC.,

Respondent.

Petition For Writ Of Certiorari To The State Of Michigan Court Of Appeals

SUPPLEMENTAL APPENDIX

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STATE OF MICHIGAN
COURT OF APPEALS

DEBORAH S. BLUE and RONALD M. BLUE, Plaintiffs-Appellants, v GENESEE MEMORIAL HOSPITAL, INC., Defendant-Appellee, and LEONARD L. J. DIAS, M.D., P.C., and LEONARD L. J. DIAS, M.D., Defendants.	APR 27 1990 No. 106593

Before: Holbrook, Jr., P.J., and Brennan and Reilly, JJ.
PER CURIAM.

Plaintiffs appeal from an order of summary disposition dismissing their malpractice and/or negligence claims against defendant Genesee Memorial Hospital, Inc. on the ground of governmental immunity. We affirm.

I

Plaintiffs' claims are based on injuries sustained by plaintiff Deborah Blue as a result of alleged malpractice and/or negligent medical care afforded her during a period of hospitalization in October of 1983. Plaintiffs' primary argument is that governmental immunity is inapplicable because the hospital is now operated by

defendant, a private non-profit corporation, even though it was owned and operated by the County of Genesee through its Board of County Institutions at the time of Blue's hospitalization. Despite its change in ownership from public to private status, the hospital was and is known, at all pertinent times, as Genesee Memorial Hospital.

A

The history of the legal status of the hospital at all times pertinent to this case is largely undisputed. Several months after Blue was hospitalized, on January 1, 1984, hospital operations were turned over by the county to defendant corporation, and the county relinquished all hospital assets in the transfer procedure. The transfer was accomplished pursuant to an agreement requiring defendant to assume certain liabilities for injuries arising from the rendering of professional services during prior times of the county's operation (apparently inclusive of the instant case). Although a fair amount of public controversy preceded the transfer, the transfer itself was accomplished without any break or disruption of operations.

Although the hospital's transformation into a private entity occurred in 1984, the impetus for the reorganization relates back at least to 1980 when a health systems agency plan for eliminating excess hospital bed capacity in the local area was issued. The plan required Genesee Memorial Hospital to seek consolidation or merger with another hospital in order to avoid closure. The then county-owned hospital reached an agreement for affiliation with McLaren General Hospital, and, pursuant to

this agreement, defendant's corporate entity was formed in 1981 in order to acquire the hospital. Consummation of the reorganization was deferred until the resolution of litigation instituted by another area hospital attempting to prevent the affiliation. Prior to the county's relinquishment of the hospital and its operations on January 1, 1984, defendant remained a corporate shell without assets.

B

Because the hospital was county-owned and -operated at the time that plaintiffs' cause of action arose, the circuit court concluded that the tort claims against defendant were barred by governmental immunity. Plaintiffs now argue that the court thereby impermissibly conferred immunity on a private corporation. (The county is not a party to this suit.)

We disagree. The bar of the doctrine of governmental immunity is not a defense personal to the particular defendant being sued, but rather it is an inherent characteristic of the particular governmental entity responsible for the acts or conduct that provide the basis for the tort claim. *Ross v Consumers Power Co (On Reh)*, 420 Mich 562, 621, n 34; 363 NW2d 641 (1984). It is the status of the tortfeasor as a public or private entity at the time that the cause of action arose that is controlling. A publicly owned hospital cannot go private and thereby divest itself of immunity for acts for which tort liability was previously precluded. A change in ownership does not revive liability that did not previously exist.

Thus, plaintiffs' argument misses the point. The circuit court did not confer immunity on a private corporation; it instead recognized that a claim barred by immunity does not thereby become actionable by reason of a subsequent change in ownership. All factual events fixing liability or non-liability had already occurred prior to the reorganization. We discern no reason in law or policy why defendant, as the successor corporation to a public hospital, should be deemed to have contracted for or to have assumed any greater liability than that attaching to the governmental entity responsible for alleged tortious conduct.

C

We also do not agree with plaintiffs' contention that the county and defendant corporation should be regarded as effectively one merged public entity as of the time that the acts constituting plaintiffs' claim occurred. At that time, defendant was a non-functioning corporation formed in anticipation of its future acquisition of hospital operations. There is no allegation or indication of any fraud, illegality, or improper or unjust use of the corporate form that would justify a disregard of defendant's separate corporate entity. See *Soloman v Western Hills Development Co (After Remand)*, 110 Mich App 257; 312 NW2d 428 (1981). Nor is there any indication that the two entities (the Board of County Institutions and the private corporation) were conducted without a separation of records, board meetings, or other institutional formalities. On the contrary, the reasons for maintaining defendant as a separate corporation appear to be entirely legitimate and consistent with public policy. See *Helzer v F Joseph*

Lamb Co, 171 Mich App 6, 9-10; 429 NW2d 835 (1988), lv den 432 Mich 885 (1989).

We conclude that the doctrine of governmental immunity is applicable to claimed tortious acts performed in a hospital that was county-owned and -operated at the time that the acts occurred.

II

Plaintiffs argue that, at the time of Blue's hospitalization, the hospital was not operating pursuant to law, as required by the principles of immunity set forth in *Ross, supra*, and *Hyde v University of Michigan Board of Regents*, 426 Mich 227; 393 NW2d 847 (1986). We disagree. County ownership and operation of a hospital are expressly authorized by statute. See MCL 331.151 *et seq.*; MSA 14.1131 *et seq.*, MCL 400.151 *et seq.*; MSA 14.1100(1) *et seq.* The operation of a hospital implicitly requires care and treatment of its patients. *Hyde, supra*, 247. Although the statutes expressly mention treatment of tuberculosis as a purpose for operating county hospitals, the functions of such hospitals are not limited to infectious diseases. Even if Genesee Memorial Hospital did begin its existence as a tuberculosis hospital, its statutory authorization was broad enough to encompass the treatment of Blue, the injured plaintiff.

The allegation that the hospital reorganization contemplated in 1981 and consummated on January 1, 1984, was motivated in part by a desire to preserve its employees' jobs does nothing to take hospital operations outside the ambit of its statutory authorization. These subjective considerations of hospital management do not

alter the status of the hospital as the county's exercise of a governmental function.

Similarly, the issuance of a health systems plan requiring the hospital either to seek reorganization or to be closed did not change the statutory authorization of the county to operate a hospital. The plan was issued pursuant to provisions of the Public Health Code requiring the identification and elimination of excess bed capacity. It contemplated that Genesee Memorial Hospital be either merged or consolidated with another hospital or subjected to closure, but its closure requirement was not intended to be enforced immediately. See 1978 PA 368, MCL 333.22101 *et seq.*; MSA 14.15(22101) *et seq.* [now MCL 333.22201 *et seq.*; MSA 14.15(22201) *et seq.*]. Until such time that the county divested itself of ownership of the hospital or closed the hospital in compliance with the plan, its statutory authority remained intact.

We conclude that the operation of a hospital and care of plaintiff Deborah Blue were in pursuance of a governmental function.

III

Plaintiffs argue that the hospital's history of profitable operations indicates that it was engaged in a proprietary function excepted from governmental immunity by MCL 691.1413; MSA 3.996(113). In *Hyde, supra*, 257-258, the Court indicated that this issue is to be resolved by a two-part inquiry. A governmental activity is proprietary if: (1) the activity is conducted primarily for the purpose of producing a profit, and (2) the activity cannot normally be supported by fees or taxes. Although the existence of a

profitable history of operations is relevant to the first inquiry, it is not conclusive. *Id.*, 258-259. If any profit is applied to finance unrelated functions of the governmental entity owning the profitable operation, instead of being applied to current and long-range expenditures associated with the operation of the profit-making function, this use of excess funds is indicative of a primary profit-oriented purpose. *Id.*, 259.

Plaintiffs have failed to demonstrate a primary purpose to produce a profit. An excess of income over expenses was realized in only two of the last four years that the county operated the hospital, hardly a compelling indication of a profit-oriented purpose. Some of the purchase price paid to the county for the hospital was financed out of the hospital's cash on hand, but this says little about the purpose for county operation of the hospital prior to the transfer of its assets to defendant corporation. Defendant established by affidavit that all excess revenues were segregated from the county's general funds and that these revenues were devoted only to hospital functions. We conclude that plaintiffs have failed to demonstrate any genuine issue of material fact or to controvert the documented lack of a profit-making purpose for hospital operations. See also *Totsky v Henry Ford Hospital*, 169 Mich App 286, 290-292; 425 NW2d 531 (1988).

Moreover, defendant submitted an affidavit that indicates, apparently without contradiction, that "Genesee Memorial Hospital was financed normally by fees for services provided." This assertion is consistent with the hospital's financial statements showing the sources of its income. The conclusion emerges that the hospital was

intended to be a self-sustaining operation. Thus, the operation of the county hospital fails to satisfy the second part of the proprietary function test, that it not normally be supported by taxes or fees.

We conclude that the county's operation of Genesee Memorial Hospital was not in discharge of a proprietary function at the time of the acts or conduct serving as the basis for plaintiffs' claim.

IV

Plaintiffs argue that the circuit court should not have granted defendant leave to amend its pleadings in order to raise governmental immunity as a defense. We find no abuse of discretion on the part of the trial court in granting defendant leave to amend, especially when we consider the law in existence at the time.

Plaintiffs make a related argument that defendant should be estopped by its own affirmative acts from raising governmental immunity as an issue in this case. The elements of an equitable estoppel are: (1) the party by representations, admissions, or silence intentionally or negligently induces another to believe facts (2) the other party justifiably relies and acts upon this belief and (3) the other party will be prejudiced if the first party is permitted to deny those facts. *City of Holland v Manish Enterprises*, 174 Mich App 509, 514; 436 NW2d 398 (1988). If silence is relied to establish an estoppel, the party thereby concealing its rights must by this course of conduct have shown such gross negligence as to have knowingly encouraged or influenced the other party, who is

wholly ignorant of the true state of affairs, to act to his or her detriment. *Commercial Union Ins Co v Medical Protective Co*, 136 Mich App 412, 422; 356 NW2d 648 (1984), modified 426 Mich 109; 393 NW2d 479 (1986). Where a plaintiff from the outset should have known those facts bringing the case within the bar of governmental immunity, the defendant will not be estopped from asserting its immunity. See *Beyer v Fraternal Order of Eagles, Aerie No 668*, 123 Mich App 492, 499; 333 NW2d 314 (1983).

In this case, none of the allegations made by plaintiffs are sufficient as a matter of law to invoke an estoppel and defendant is under no affirmative obligation to volunteer whether the claimed tortious acts were committed by a public or private entity. Absent any allegation that defendant attempted to conceal facts supporting an immunity claim or thwarted plaintiffs' attempts at discovery of the same, it is difficult to see how defendant's silence, i.e., its delay in asserting immunity, induced or misled plaintiffs to believe otherwise. Indeed, defendant would have had no plausible incentive to conceal immunity as an issue; the delay in raising it appears to have been caused by defendant's own belated realization of the applicability of the doctrine. There is simply no indication that any of defendant's employees or agents misrepresented or did anything calculated to misrepresent the hospital's governmental status prior to defendant's acquisition of the hospital on January 1, 1984. Although plaintiffs suggest that the advice of rights in the arbitration form offered to Blue pursuant to the Medical Malpractice Arbitration Act lulled them into believing that

they had a right to obtain an adjudication of liability, nothing in that form disclaimed governmental immunity.

V

Plaintiffs argue that their claimed injuries arising from improper medical care are actionable in contract, thereby evading the strictures of governmental immunity. Specifically, plaintiffs raise three theories from which they claim that a contractual duty can be imposed upon defendant: (1) the arbitration agreement signed and later revoked pursuant to the Medical Malpractice Arbitration Act, (2) plaintiffs' personal check in payment of hospital services, which was endorsed by defendant, and (3) breach of an implied contractual duty by the hospital in the course of its care and treatment of Deborah Blue. However, a contractual theory of recovery for deficient medical care requires identification of a special agreement to perform a specific undertaking by the health care provider for the purpose of accomplishing a certain act or result. See *Penner v Seaway Hospital*, 169 Mich App 502, 508-510; 427 NW2d 584 (1988). Plaintiffs do not explain how any of their dealings with the hospital give rise to a contractual duty to provide a specific standard of care or to warrant a certain result in Blue's treatment. Having reviewed copies of the pertinent documents supplied by plaintiffs, we do not see any clause from which it may be understood or fairly implied that defendant contracted to guarantee plaintiffs any particular standard of care. Because plaintiffs have failed to identity any special contractual duty or to cite any legal authority supporting their argument, we conclude that they have failed as a

matter of law to raise any viable theory of recovery in contract.

VI

Plaintiffs argue that the retroactive application of the *Ross* reformulation of governmental immunity is unconstitutional as applied to them. In *Hyde, supra,* 241, the Court mandated that the holdings in *Ross,* including its application to hospitals operated by governmental entities, were retroactively applicable to all cases filed after the January 22, 1985 *Ross* release date and to those cases pending at that time which properly raised a governmental immunity issue. Even though the issue of governmental immunity was not raised in this case until after January 22, 1985, the case itself was commenced after that date. Therefore, Ross controls. Prior to *Ross,* public hospitals were not immune from tort liability. See *Parker v Highland Park,* 404 Mich 183; 273 NW2d 413 (1978). According to plaintiffs, the rule of limited retroactivity adopted in *Hyde* makes an irrational and arbitrary distinction between those tort claimants filing suit before January 22, 1985, and those filing after, when all such claimants, regardless of the time of their institution of suit, acquired their cause of action prior to the *Ross* decision.

Even if we thought that this contention had some merit, we would be extremely reluctant to hold that a rule set forth by our Supreme Court is unconstitutional, given our posture as an inferior court. Presumably the *Hyde* Court, in devising a rule of retroactivity, thought through the constitutional repercussions of its decision, and a

conclusion of constitutional validity can therefore be fairly implied from the holding itself.

Generally, judicial decisions regarding the retroactivity or prospectivity of a new rule of law imposed by judicial decision are free of constitutional constraints. *People v Hampton*, 384 Mich 668, 673-674; 187 NW2d 404 (1971). In *Helmer v People's Community Hospital Authority*, 161 Mich App 675, 679-680; 411 NW2d 823 (1987), a panel of this Court held that retroactive application of *Ross* to bar a claim against a public hospital did not deprive the plaintiff of due process. Likewise, we find no constitutional impediment in the application of the *Hyde* rule of retroactivity to this case.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Thomas J. Brennan
/s/ Maureen Pulte Reilly